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FILED

In the Supreme Court of the United States

October Term, 1959

Ellis A. Dorsey, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 606

HELEN A. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 15;[1] Pet. App. A) is reported at 260 F. 2d 591.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 1958 (R. 16; Pet. App. B), and a timely petition for rehearing was denied on December 5, 1958 (R. 17). The petition for a writ of certiorari

[1] "R." designates Volume I of the Record (pp. 1-18). This volume contains, *inter alia*, a copy of the 15-page indictment (IR. —), the verdict, the sentence and the proceedings had in the Court of Appeals. The trial transcript consists of 7 volumes and is designated "T.".

was filed on December 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's indictment and conviction for conspiracy to commit mail fraud offenses was invalid because she was not also indicted for the substantive offenses.

STATEMENT

On October 3, 1956, petitioner and eight others were indicted in the last count of a 13-count indictment, returned in the District Court for the District of Oregon, with conspiring to violate 18 U.S.C. 1341 (using the mails to defraud) and 15 U.S.C. 77q(a) (using the mails in a scheme to defraud in the sale of securities in interstate commerce) (IR. 10–14). The preceding 12 counts charged the defendants, except for petitioner and defendant Williams, with particular substantive mail fraud offenses in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a) (IR 1–10).[2]

Count 1—which did not name petitioner—contained a general description of the scheme to defraud. The plan consisted of the organization of the Mt. Hood Cooperative, purportedly set up for the purpose of building and operating a large scale sawmill, plywood and hardboard plant. The indictment charged that, by means of a large scale advertising campaign, the named defendants represented, *inter alia*, that this

[2] Prior to the trial, defendant Errion pleaded guilty to counts 2 and 9 and defendant Montgomery to count 13. The indictment was dismissed as to defendant Williams during the trial, due to his serious illness (T. 1111–1414).

cooperative would provide continuous employment and job security to its members; that finances to construct the plant had been arranged for; and that the funds paid to purchase certificates of membership would be retained in a reserve and used only for working capital. As a result of these inducements, it was alleged, 650 people purchased shares in Mt. Hood, at $1,000 per share. In fact, these statements were not true, the actual purpose of the plan being to siphon off these funds invested in Mt. Hood, to the personal profit of the defendants. This was accomplished, in part, by having Mt. Hood enter into a service contract with the Davenport Corporation, which was controlled by defendants. Under the agreement the defendants were able to obtain a large portion of the invested funds as secret profit. Additionally, the Davenport Corporation was utilized in real estate transactions which further worked to deplete the funds invested in Mt. Hood (IR. 1–4).

The second portion of count 1 charged the named defendants with mailing a certificate of membership in Mt. Hood to a particular purchaser in violation of 18 U.S.C. 1341 (IR. 4). Each of counts 2–7[3] realleged by reference the general scheme spelled out in count 1, and each charged a particular use of the mails in violation of 18 U.S.C. 1341 (IR. 5–7). Counts 8–12, charging the fraudulent sale of securities by mail, likewise incorporated by reference the general scheme to defraud as described in count 1, and alleged particular sales of securities (IR. 7–10).

[3] Count 4 was dismissed at the conclusion of the trial.

The conspiracy count (count 13), the only one in which petitioner was named, "realleged and incorporated by reference" the scheme to defraud as set out in count 1, and incorporated as overt acts in furtherance of the conspiracy, each of the particular substantive violations set out in counts 1–12 (IR. 10). Twenty-eight additional overt acts were enumerated, petitioner being named in four of these (IR 11–14; Pet. App. A, p. 34, fn. 1).

Following a jury trial, petitioner was found guilty under the conspiracy count (count 13) and sentenced to imprisonment for one year (R. 8).[*] The Court of Appeals unanimously affirmed petitioner's conviction (R. 15; Pet. App. A).

ARGUMENT

Petitioner does not here challenge the holding of the Court of Appeals that the evidence is sufficient to sustain her conviction. She attacks solely the validity of the indictment. Petitioner argues that, not having been named as a defendant in the substantitive counts—particularly count 1 which described the scheme to defraud—she could not have been indicted for, or convicted of, conspiracy to commit the substantive offenses. This contention appears to proceed on the novel theory that the absence of a substantive charge against petitioner was tantamount to an allegation that she was innocent of any involvement or par-

[*] The other defendants named in the indictment who were convicted were sentenced as follows: Munkers 7 years; Errion 6 years; Bones 18 months; Locke 3 years; Wright 15 months; Montgomery 15 months (R. 9). Defendant Martin was acquitted on all counts.

ticipation in the scheme to defraud, thus rendering the conspiracy charge fatally defective. This argument is without merit.

A conspiracy to violate the mail fraud statutes is a separate and distinct offense from the substantive crime of mail fraud (*Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643–644). It may be, as petitioner seems to argue, that as a member of the conspiracy she could also have been held responsible for the substantive offenses even though she may not have directly performed the mailings which found the basis of those counts (*Pinkerton* v. *United States*, 328 U.S. 640). But it does not follow that, because the grand jury did not indict her for all the offenses for which she might have been tried, she could not be tried for one for which she was indicted. See *United States* v. *Thompson*, 251 U.S. 407, holding that even if one grand jury may refuse to indict, an indictment subsequently returned by another grand jury, on the same facts, is valid and may sustain a conviction. See also, *Alexander* v. *United States*, 95 F. 2d 873 (C.A. 8), certiorari denied, 305 U.S. 637.

While petitioner may not have been a prime mover in the extensive criminal scheme to defraud the investors in the Mt. Hood Cooperative, the evidence adduced at the trial, as discussed in the opinion of the court below, was certainly sufficient for the jury to find that she had participated in the conspiracy. As this Court observed in *Blumenthal* v. *United States*, 332 U.S. 539, 557: "Secrecy and concealment are

essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightfully gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others."

Petitioner made no pretrial motion, pursuant to Rule 12(b) (2) and (3) of the Federal Rules of Criminal Procedure, challenging the validity of the conspiracy charge. Her allegation here, in essence, amounts to the anomalous complaint that she was charged with fewer crimes than she could have been. Certainly this raises no issue warranting review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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